Supreme Court, U.S.
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No. 98-1327

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

SUSAN OYGARD and NORVALD OYGARD,

Petitioners,

v.

TOWN OF COVENTRY, COVENTRY TOWN COUNCIL, JOAN LEWIS, JOHN ELSESSER, RICHARD ASHLEY and ALAN KOEPKE,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

1. Did the respondents deny the petitioners due process of law in violation of the Fourteenth Amendment?

2. Did the respondents deny the petitioners equal protection of the law in violation of the Fourteenth Amendment?

3. Did the courts below correctly conclude that petitioners lacked standing to raise a RICO claim?

4. Did the courts below correctly remand the case to the District Court, so the District Court could in turn remand the pendant state law claims to the Connecticut State Court?

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STATEMENT OF THE CASE

In 1986 co-defendant Alan Koepke (hereinafter "Koepke"), purchased a parcel of land located across the street from the Oygards' property in the Town of Coventry. Petitioners' App. 25. The Town of Coventry, through its Zoning Officer, Robert Eisner (hereinafter "Eisner"), issued a permit to Koepke on August 7, 1986, allowing Koepke to erect a telecommunications tower on his property. Petitioners' App. 25. On August 12, 1986, plaintiff Susan Oygard challenged the issue of the permit by appealing to the Coventry Zoning Board of Appeals (hereinafter "ZBA"). Petitioners' App. 26.

On September 16, 1986, the ZBA sustained Oygard's appeal and ordered Eisner to revoke Koepke's permit. Petitioners' App. 26. Eisner issued Stop Work Orders on September 18, 1986 and on September 26, 1986. Petitioners' App. 27. In response, codefendant Koepke exercised his right under Conn. Gen. Stat. § 8-8 and, on October 2, 1986, appealed the ZBA's ruling to the Connecticut Superior Court. Petitioners' App. 27-28.

While Koepke's appeal of the ZBA ruling was pending, he sued the Town of Coventry for money damages and injunctive relief, to prevent the Town from interfering with construction and utilization of his telecommunications facility. Petitioners' App. 29. On September 26, 1986 Koepke prevailed on his appeal of the ZBA ruling; the Connecticut Superior Court held that Koepke's permit should be reinstated. Petitioners' App. 29. The Town of Coventry thereafter exercised its discretion in deciding not to spend further taxpayer dollars by appealing the Trial Court's ruling. Petitioners' App. 29-30. The Oygards, however, appealed the Trial Court's decision. Petitioners' App. 30.

The Connecticut Appellate Courts sustained the Superior Court ruling, holding that the ZBA lacked jurisdiction due to inadequate notice. *Koepke v. Zoning Board of Appeals*, 25 Conn. App. 611, 595 A.2d 935 (1991). The Oygards appealed to the Connecticut Supreme Court, which also held that the ZBA lacked jurisdiction to hear her appeal since public notice of the hearing was insufficient. *Koepke v. Zoning Board of Appeals*, 233 Conn. 171, 610 A.2d 1301 (1992). The Connecticut Supreme Court remanded so that the Connecticut Appellate Court could determine if Susan Oygard's appeal to the ZBA was timely, in which case a new hearing would be held. On remand, the Connecticut Appellate Court held that Susan Oygard's appeal to the ZBA was not timely. *Koepke v. Zoning Board of Appeals*, 30 Conn. App. 395, 620 A.2d 811 (1993). On appeal, the Connecticut Supreme Court reversed, holding that Susan Oygard's appeal was timely, and remanded the case to the Zoning Board of Appeals for a new hearing. *Koepke v. Zoning Board of Appeals*, 230 Conn. 452, 645 A.2d 983 (1994).

In June 1995 the ZBA voted to sustain Susan Oygard's appeal from the issuance of the 1986 zoning permit. Petitioners' App. 31. Koepke appealed this decision to the Superior Court. Petitioners' App. 31. While the appeal was pending, on August 6, 1996, Koepke took down the subject communications tower and thereafter sold his property. Respondents' App. 3.

The respondents specifically deny petitioners' statement on page 6 of the petition that co-defendant Koepke constructed his radio tower "with the cooperation of the Coventry Building Inspector." In fact, after the Coventry Zoning Board of Appeals voted to revoke Koepke's zoning permit for the subject tower, Coventry building official John Wilnauer issued a "Stop Work Order" for Koepke's building permit. Petitioners' App. 27.

REASONS FOR DENYING THE WRIT

I.

THE COURT OF APPEALS PROPERLY REMANDED THE CASE TO THE DISTRICT COURT SO THAT STATE LAW CLAIMS COULD BE REMANDED TO STATE COURT.

The Court of Appeals for the Second Circuit has not departed from the accepted and usual course of judicial proceedings or sanctioned such a departure so as to call for an exercise of this Court's supervisory power. Specifically, the Court of Appeals did not depart from the accepted and usual course of judicial proceedings in its handling of the disposition of the counterclaim by the District Court. The Court of Appeals, in its ruling on the Oygards' appeal, noted that the District Court's decision to decline to exercise jurisdiction over the plaintiffs' state law claims once judgment had entered against the plaintiffs on the federal claims was proper. This finding was legally correct. *See Carnegie-Mellon Univ. v. Cohill*, 484 U.S. 343, 350 (1988); *DeLaura v. Power Authority of New York*, 982 F.2d 73, 80 (2d Cir. 1992). The reason the Court of Appeals remanded the case to the District Court was that the District Court dismissed the pendant state law claims, when it should have remanded them to the Connecticut Superior Court. *See Carnegie-Mellon Univ. v. Cohill*, *supra* at 357. The Court of Appeals further noted that it was unclear from the record whether the District Court ruled on the Town of Coventry's Motion for Summary Judgment on its counterclaim. The lack of clarity stems from the facts that the District Court's Order granting summary judgment could arguably have extended to the defendant's counterclaim; however, ruling on the counterclaim would have been contrary to the court's stated intention to decline to exercise jurisdiction over state law claims.

II.

CONTRARY TO THE PETITIONERS' CLAIM, THE COURT OF APPEALS DID NOT ISSUE A RULING ADDRESSED TO "AN IMAGINARY COMPLAINT."

The petitioners claim the Court of Appeals departed from the accepted and usual course of judicial proceedings by issuing a ruling addressed to "an imaginary complaint." There is little question, however, that the District Court focused on the plaintiffs' amended complaint dated October 30, 1996, beginning at Oygard App. 23, when ruling that the Oygards' substantive due process, procedural due process, and equal protection rights had not been violated. Similarly, the Court of Appeals recognized the District Court had analyzed the plaintiffs' federal claims, and concluded it could add little to the District Court analysis. Oygard App. 20.

Even if, as petitioners claim, the court should have analyzed whether petitioners had a property interest in the utilization of the appeal procedures and Conn. Gen. Stat. § 8-7 and § 8-8, the result below would have been the same. In relevant part § 8-7 provides as follows:

> An appeal [to the Zoning Board of Appeals] shall not stay any such order, requirement or decision which prohibits further construction or expansion of the use in violation of such zoning regulations except to such extent that the Board grants a stay thereof. An appeal from *any other order, requirement or decision shall stay all proceedings in the action appealed from*. . . .

(Emphasis added).

In the present case, the Oygards' appeal pursuant to § 8-7 was from "any other order" and stayed "all proceedings in the action appealed from." However, "proceedings" refers to legal enforcement proceedings. *State v. Magnotta*, 1 Conn. Cir. 151, 172 A.2d 515 (1961). Regardless of how the Oygards' due process claim is viewed, in the final analysis they would need to demonstrate a property interest in the enforcement of a zoning regulation against an abutting landowner, and the Court of Appeals did not depart from the usual course of judicial proceedings by approving the District Court decision which held that no such property interest exists. *See Gagliardi v. Village of Pawling*, 18 F.3d 188, 192 (2d Cir. 1994) (plaintiffs have no constitutional right to demand that municipal officials enforce zoning laws). *Ellentuck v. Klein*, 570 F.2d 414, 430 (2d Cir. 1978) (claimed that zoning permit was improperly issued and that conspiracy existed in favor of developer at expense of neighborhood is not cognizable under § 1983).

III.

THE COURT OF APPEALS' DECISION IS NOT IN CONFLICT WITH OTHER DECISIONS.

A Writ of Certiorari should not be granted on the basis that the decision by the Court of Appeals on the Oygards' appeal is in conflict with other decisions. The Court of Appeals followed a uniform body of case law in affirming the District Court's finding that the Oygards failed to demonstrate a constitutionally protected property interest.

To state a substantive due process claim a party must first establish that he had a valid property interest in a benefit that was entitled to constitutional protection at the time he

was deprived of that benefit. *Zahra v. Town of Southold*, 48 F.3d 674, 680 (2d Cir. 1995); *Brady v. Town of Colchester*, 863 F.2d 205, 211-12 (2d Cir. 1988) (citing *Board of Regents v. Roth*, 408 U.S. 564, 576-77, 92 S. Ct. 2701, 33 L. Ed. 2d 548 (1972)). The Second Circuit uses a strict "entitlement" test to determine whether a party's interest in land-use regulation is protectable under the Fourteenth Amendment. *Gagliardi v. Village of Pawling*, 18 F.3d 188, 192 (2d Cir. 1994); *RRI Realty Corp. v. Incorporated Village of South Hampton*, 870 F.2d 911, 918 (2d Cir. 1989); *Yale Auto Parts, Inc. v. Johnson*, 758 F.2d 54, 58-59 (2d Cir. 1985). In addition to demonstrating strict "entitlement" the party must further demonstrate that the defendant acted in an arbitrary or irrational manner in depriving him of the protected property interest, in order to show a deprivation of substantive due process. *See Crowley v. Courville*, 76 F.3d 47, 52 (2d Cir. 1996); *Frooks v. Town of Cortlandt*, __ F. Supp. __, 1998 WL 113099, *6 (S.D.N.Y. March 11, 1998).

Substantive due process protects against government action that is arbitrary, conscience shocking or oppressive in a constitutional sense, but not against a government action that is merely "incorrect or ill advised." *Kaluczky v. City of White Plains*, 57 F.3d 202, 211 (2d Cir. 1995) (quoting *Lowrance v. Achtyl*, 20 F.3d 529, 538 (2d Cir. 1994). When considering a due process claim the federal courts are mindful of the general proscription that they "should not become zoning boards of appeal to review non-constitutional land use determinations by . . . local legislative and administrative agencies." *Zahra v. Town of Southold*, 48 F.3d 674, 679-80 (2d Cir. 1995) (quoting *Sullivan v. Town of Salem*, 805 F.2d 81, 82 (2d Cir. 1986). To state a substantive due process claim, the complainant must first demonstrate a "legitimate claim of entitlement" to the benefits in question. *Crowley v. Courville*, 76 F.3d 47, 52 (2d Cir. 1996).

> The focus of the analysis is on the nature of the applicant's interest . . . specifically whether the applicant has a clear entitlement to the approval sought by the government official or administrative body.

Walz v. Town of Smithtown, 46 F.3d 162, 167-68 (2d Cir. 1995). The key to determining the existence of such property interest is the extent to which the deciding authority may exercise discretion in reaching its decision, rather than an estimate of the likelihood of a particular result. *RRI Realty Corp. v. Incorporated Village of South Hampton*, 870 F.2d 911, 918 (2d Cir. 1989). If there exists an adequate property interest, then the plaintiff must show that the defendant acted in an arbitrary or irrational manner to deprive him or her of that interest. *Crowley*, 76 F.3d at 84-85.

The Oygards do not allege the deprivation of a federally protected right. Although the amended complaint alleges violations of due process without much elaboration, the plaintiffs' due process claim is based on the contention that the defendants conspired to deprive the plaintiffs of rights secured by state zoning statutes and town zoning regulations. Nothing in the plaintiffs' Amended Complaint indicates the plaintiffs have been deprived of a specific property right. Clearly, the plaintiffs do not have any entitlement to uses of neighboring property on the ground that those uses may affect the market value of their property. *Mehta v. Surles*, 905 F.2d 594, 598 (2d Cir. 1990); *Fusco v. State of Connecticut*, 815 F.2d 201, 206 (2d Cir. 1987). Nor do the plaintiffs have a constitutional right to demand that municipal officials enforce zoning laws. *Gagliardi v. Village of Pawling*, 18 F.3d 188, 192 (2d Cir. 1994). For instance, the mere existence of state procedures for rectifying erroneous or obsolete violations

does not give rise to an independent property interest protected by the Fourteenth Amendment. *See Yale Auto Parts, Inc. v. Johnson*, 758 F.2d 54, 58-59 (2d Cir. 1985). In addition, in *Zahra v. Town of Southold*, 48 F.3d 674 (2d Cir. 1995), the court held:

> The mere existence of procedures for obtaining a permit or certificate do not, in and of themselves, create constitutional property interests. We expressly decline to announce a rule that would obligate federal courts to consider endless numbers of alleged property interests arising not from the benefits themselves but as extensions of existing or sought property interests.

Id. at 682.

It is axiomatic that before procedural due process can be considered to have been denied, a constitutionally protected property interest must exist and be identified. *See Numanchi v. Board of Trustees of Conn. State Univ.*, 850 F.2d 70 (2d Cir. 1988), citing *Matthews v. Eldridge*, 424 U.S. 319 (1976). For the reasons set forth above the Oygards have no constitutionally protected property interest to which the procedural due process requirement would apply. That said, the municipal defendants note that the plaintiffs took full advantage of their opportunity to be heard, *cf. Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 542 (1984), at the zoning board level, at the trial court level, and the Connecticut Appellate and Supreme Court levels. Not only did the plaintiffs take full advantage of their opportunity to be heard, but they succeeded when they did so. There can be no violation of procedural due process under these circumstances.

It is well settled that the constitutional guarantee of equal protection is intended to keep "governmental decision makers from treating differently persons who are in all relevant aspects alike." *Nicholas v. Tucker*, 114 F.3d 17, 20 (2d Cir. 1997). The Oygards' equal protection claim does not challenge the state zoning statutes themselves, but rather the purported "selective enforcement" of the zoning statutes. It has been held that selective enforcement is a "murky corner of equal protection law in which there are surprisingly few cases." *LeClair v. Saunders*, 627 F.2d 606, 608 (2d Cir. 1980), *cert. denied*, 450 U.S. 959, 101 S. Ct. 1418, 67 L. Ed. 2d 383 (1981). Nevertheless, this Court has ruled that such a claim is proper when it is established that: (1) The person, compared with others similarly situated, was selectively treated; and (2) the selective treatment was motivated by an intention to discriminate on the basis of impermissible considerations such as race or religion, to punish or inhibit the exercise of constitutional rights, or by malicious or bad faith intent to injure the person. *Zahra v. Town of Southold*, 48 F.3d 674, 683; *FSK Drug Corp. v. Perales*, 960 F.2d 6, 10 (2d Cir. 1992); *see LaTireste Restaurant and Cabaret, Inc. v. Village of Port Chester*, 40 F.3d 587, 590 (2d Cir. 1994); *Terminate Control Corp. v. Horowitz*, 28 F.3d 1335, 1352 (2d Cir. 1994).

In granting summary judgment in favor of the municipal defendants on the equal protection claim the District Court correctly noted that the plaintiffs failed to produce any evidence that other similarly situated landowners were treated differently than were they. The complaint is devoid of any allegation that the municipal defendants would have enforced the zoning regulations at the request of another resident whose situation was similar to the Oygards. In the absence of such factual assertions, the plaintiffs' equal protection claim is insufficient as a matter of law. *See Gagliardi v. Village of*

Pawling, 18 F.3d 188, 193 (2d Cir. 1994). Furthermore, the complaint does not allege a malicious or bad faith intent to injure the Oygards, nor is there any issue of material fact that the municipal defendants had no such intention. Even if one were to assume all of the Oygards' allegations to be true, the municipal defendants' intentions would have been to work with Koepke to secure advantageous radio communications service, but could never be construed to be an intention to harm the Oygards.

Nor is the Court of Appeals' ruling on the plaintiff's RICO claim in conflict with other decisions. In *Oscar v. University Students Co-op Association*, 965 F.2d 783 (9th Cir. 1992), *cert. denied*, 506 U.S. 1020 (1992), plaintiff rented an apartment near a student co-op building. Because of illegal activities at the co-op, plaintiff filed a RICO claim and alleged that she had lost use and enjoyment of her rental interest and the value of such interest had declined. In upholding a dismissal of the claim the Ninth Circuit found the plaintiff failed to allege an injury to business or property cognizable under RICO. The court emphasized that while RICO was generally to be liberally construed, the requirement that the plaintiffs allege and prove that they were "injured in their business or property" is a significant limitation on their right to recover. 965 F.2d at 785-86 (noting that the Supreme Court characterized this language as being of restrictive significance, *Reiter v. Sonotone Corp.*, 442 U.S. 330, 339 (1979)). A showing of injury requires "proof of concrete financial loss." *Oscar*, 965 F.2d at 785. The *Oscar* court then found the plaintiff's pleading insufficient to survive a motion to dismiss:

> Oscar does not allege any financial loss which would be compensable under RICO . . . the only

> injury she has alleged is a "decrease in the value of property" due to the racketeering activity next door. We do not believe such a decrease entails financial loss to Oscar.

Id. at 786. The *Oscar* court then noted that there was no allegation that Oscar had ever attempted to sublet the apartment or even that she ever wished to intend or intended to sublet it. Thus, "any supposed loss is therefore purely speculative." *Id.* at 787.

The facts and holding in *Oscar* relate directly to the Oygards' circumstances. The Ninth Circuit implied that just as there was no reason to believe that plaintiff Oscar ever attempted to sublet her apartment, there is equally no evidence that the Oygards intended to develop or subdivide the property. Simply being adjacent to an alleged racketeering activity is not a "proof of concrete financial loss" required in a RICO action. The Oygards' RICO Case Statement simply indicates that "according to a certified appraiser nearly 100% of potential buyers of plaintiffs' property would not want to defendant Koepke's radio tower from their residence." This statement does not rise to an allegation that plaintiffs have suffered a concrete financial loss. *See Hecht v. Commerce Clearing House, Inc.*, 897 F.2d 21, 24 (2d Cir. 1990) (injury of lost business commissions is "too speculative to confer standing, because Hecht only alleges that he would have lost commissions in the future, and not that he has lost any yet"); *Bankers Trust v. Rhoades*, 859 F.2d 1096, 1104 (2d Cir. 1988), *cert. denied*, 490 U.S. 1007 (1989) (civil RICO damages "are unrecoverable if the facts of their accrual are speculative or their amount and nature unprovable"); *In re Taxable Municipal Bond Securities Litigation*, 51 F.3d 518 (5th Cir. 1995) (mere allegation of "lost opportunity" to

secure a loan too speculative to constitute RICO injury); *Steele v. Hospital Corporation of America*, 36 F.3d 69 (9th Cir. 1994) (speculative injuries do not serve to confer standing under RICO unless they become concrete and actual); *Three Crown Ltd. Partnership v. Salmon Brothers, Inc.*, 906 F. Supp. 876 (S.D.N.Y. 1995) (damages based on investments not made or lost future profits are speculative); *First Nationwide Bank v. Gelt Funding Corp.*, 820 F. Supp. 89, 95-96 (S.D.N.Y. 1993), *aff'd*, 27 F.3d 763 (2d Cir. 1994), *cert. denied*, 115 S. Ct. 728 (1995) ("plaintiff cannot survive a motion to dismiss by alleging novel and speculative compensatory damages that may or may not arise").

CONCLUSION

Respondents respectfully request the Court to deny the Petition for Writ of Certiorari.

Respectfully submitted,

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APPENDIX

APPENDIX A — AFFIDAVIT OF ALAN J. KOEPKE

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

CIVIL ACTION

NO. 3:95CV02486 (DJS)

MARCH 31, 1997

SUSAN C. OYGARD
NORVALD OYGARD,

Plaintiffs,

v.

TOWN OF COVENTRY, COVENTRY TOWN COUNCIL, JOHN ELSESSER, JOAN LEWIS, ALAN J. KOEPKE and RICHARD A. ASHLEY,

Defendants.

AFFIDAVIT OF ALAN J. KOEPKE

I, Alan J. Koepke, hereby state the following:

1. I am over the age of 18 years and believe in the obligation of an oath.

2. I am in the business of providing communication equipment and related services to amateur and commercial users and have done business under the name of Communications & Electronics since 1968.

Appendix A

3. In conjunction with my business, I have owned or operated several radio towers in Connecticut. These towers are used by both public and private entities.

4. During the time that I have been in business, I have provided free use of tower facilities to the following towns:

TOWNS	TOWER LOCATION	SERVICE COMMENCED
Colchester, Salem, Hebron, East Hampton Marlborough	Colchester	1976
Danielson, Ashford	Coventry	1993
Tolland	Storrs/Coventry	1984/1990
Willimantic	Storrs/Coventry	1984/1990
Coventry	Storrs/Lebanon/ Coventry	1986/1986/1990

These towns provide services such as police, fire, ambulance and 911 emergency response, among other things, which I believe are beneficial to the community.

5. In July, 1986, I received a zoning permit to construct a radio antenna on North School Road in Coventry. Once the permit was issued, I exercised an option to purchase a one-third acre parcel of land on North School Road to build the

tower and a small building to house the telecommunications equipment.

6. In mid-August, 1986, Susan Oygard appealed the issuance of a zoning permit which led to nearly ten years of litigation, including two decisions each by the Connecticut Appellate Court and the Connecticut Supreme Court. I also instituted a separate civil lawsuit seeking damages against the zoning enforcement officer of the Town of Coventry.

7. In June, 1995, after the Coventry Zoning Board of Appeals, upon remand of the matter, voted to sustain Susan Oygard's appeal of the issuance of a zoning permit, I entered into a settlement agreement with the Town of Coventry to dismantle and relocate the radio tower to a site behind Coventry Town Hall. The tower was dismantled on August 6, 1996. The relocation project was completed in October, 1996.

8. I had no knowledge, until after the Oygard's complaint was filed, that the Oygards and the Town of Coventry entered into an agreement whereby the Town agreed to take enforcement action against the North School Road tower. I attended a meeting with Mrs. Oygard, town officials and other persons on March 12, 1990 to discuss the possibility of relocating the tower to the O'Connor's property on North School Road. I do not recall the subject of an agreement between the Oygards and the Town being discussed at that meeting. The first time I saw the Resolution referred to in the Amended Complaint, Second Count, ¶64, was after the Oygards' complaint was filed.

Appendix A

9. At no time from June, 1986 through August, 1996 did I ever have an agreement with any Coventry town official to provide free tower space on the North School Road tower in exchange for the town's promise not to enforce its zoning regulations against me. The free space which I provided to the Town of Coventry was no different than that which I provided to other municipalities at North School Road and other locations. The Town of Coventry paid for the telecommunications equipment and radio services which it used at my tower and electric and telephone charges associated with its use at the tower.

s/ Alan J. Koepke
Alan J. Koepke

STATE OF CONNECTICUT)
: ss. March 25, 1997
COUNTY OF TOLLAND)

Personally Appeared Alan J. Koepke Signer of the foregoing Instrument, and acknowledged the same to be his free act and deed, before me.

s/ [illegible]
Commissioner of the Superior Court